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Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C. A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

Respondents.

BRIEF FOR RESPONDENT, SILVIO GUTIERREZ, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of Case

Silvio Gutierrez, the respondent herein, moved below to quash a subpoena *duces tecum* directed to his private records and accounts with the Chemical Bank New York Trust Company in New York City.

Said subpoena was issued by the United States District Court for the Southern District of Florida in proceedings for the extradition to Venezuela of the respondent Jimenez.

instituted in said District Court by a complaint which alleged "That sufficient cause had been established for the arrest and trial of the defendant" (Jimenez), by the decree of the Federal Court of Venezuela of July 30, 1959, and that "considerable excerpts from the evidence that was before the Federal Court" are contained in the extradition documents.

No issue exists with respect to the identity of the person whose surrender is demanded, and no claim is made that the extradition documents are insufficient in any respect to establish probable cause as to the commission of the crimes charged. These are the limited functions of an extradition hearing (*Charlton* v. *Kelly*, 229 U. S. 447, 461 [1913]).

The United States Court of Appeals for the Fifth Circuit acted upon the appeal of Silvio Gutierrez from an order of the District Court denying the motion to quash the subpoena *duces tecum*, thus sustaining his standing, reversed the order appealed from, and remanded the case to the District Court with directions to quash the subpoena *duces tecum*.

The extradition proceedings are still pending, although the demanding country has submitted all its evidence with the exception of depositions of the respondent banks as ordered by Chief District Judge Ryan on May 16, 1960, in the United States District Court for the Southern District of New York, on the basis of orders entered in the Florida District Court, and the demanding country has not shown that it has been, or will be, prejudiced by the said action of the Court of Appeals for the Fifth Circuit.

ARGUMENT

The petition for the writ is without merit. The questions presented are of no public importance and relate to matters which may easily be regulated by treaties and by legislation.

There is no right of subpoena by a demanding government under the present treaty between Venezuela and the United States (43 Stat. 1698) and existing legislation and Court rules (18 U.S.C. §§ 3181-3195; Rule 54(b)(5), Federal Rules of Criminal Procedure; Rules 1, 26, 81, Federal Rules of Civil Procedure). In any event the subpoena was invalidly served more than 100 miles from the place of hearing (Rule 45(e)(1), Federal Rules of Civil Procedure).

There is no conflict between the decision below and any decision of this Court or of other courts of appeals.

A

Procedures in extradition matters are exclusively governed by congressional enactment (18 U.S.C.; §§ 3181-3195) and by treaty (Treaty with Venezuela, 43 Stat. 1698). Due process requires that the actions of the demanding country shall be limited to the existing provisions in such laws and shall not be extended by reason of any compilation of excerpts from newspapers or other publications (Appendix 4 of the present petition).

Any extension of existing procedures can be established only through further congressional enactment or other treaties.

Nothing in the said Treaty with Venezuela or in the above mentioned statutes gives the demanding country the right of subpoena or discovery. This right cannot be created by the Federal Rules of Criminal Procedure which are expressly inapplicable by their very provisions (Rule 54(b)(5)).

Extradition proceedings are not "suits of a civil nature" (*Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 271 [1935]), and, therefore, Rules 1 and 26 of the Federal Rules of Civil Procedure exclude extradition proceedings from their provisions. Nor does Rule 81 of said Rules, which states to what proceedings they are applicable, list extradition proceedings. Nor is there inherent power in the Federal Court to issue subpoenas (*Janssen* v. *Belding-Corticelli*, 84 F. 2d 577, 578 [1936]; *Perkins* v. *Endicott Johnson Corporation*, 128 F. 2d 208, 215 [1942]; affd. 317 U. S. 501, 63 S. Ct. 339; *Bowles* v. *Bay of New York Coal & Supply Corp.*, 152 F. 2d 330, 331 [1945]), and especially not in an extradition proceeding which is extremely limited in purpose (*Charlton* v. *Kelly*, 229 U. S. 447, 461 [1913]) and is a non-judicial proceeding (*United States* v. *Ferreira*, 13 How. (54 U. S.) 40 [1851]; 4 Op. Atty. Gen. 201).

B

A depositor has standing to be heard with respect to any violation of due process, any act of unlawful search and seizure, any extortion of testimony or any compulsion to act as a witness against himself, all of which is violative of, and forbidden by, the Fourth and Fifth Amendments of the Constitution (*Perlman* v. *United States*, 247 U. S. 7; 38 S. Ct. 417, 420 [1918]; *McMann* v. *Securities & Exchange Commission*, 87 F. 2d 377, 379; cert. denied 301 U. S. 684, 57 S. C. 785 [1937]; *Foster* v. *United States*, 265 F. 2d 183; cert. denied 360 U. S. 912, 79 S. C. 1297 [1959]).

C

Every other consideration notwithstanding, the subpoena *duces tecum* herein was invalidly served, since it was served upon a bank in New York City, more than 100 miles from Miami, Florida, the place of hearing (Rule 45(e)(1) Federal Rules of Civil Procedure). Since the Federal Rules of Criminal Procedure do not apply to extradition proceedings (Rule 54(b)(5)), no reliance can be had upon Rule 17(e)(1) thereof.

Conclusion

No real need exists for a demanding country to obtain the benefits of discovery or subpoena *duces tecum*, since it is free to engage in all methods of discovery permitted by the laws where the crime was committed, and to present authenticated documents showing the evidence obtained, which are admissible as evidence in the extradition proceeding (18 U.S.C. § 3190). Therefore, there is not involved here any question of Federal Law which should be settled by this Court. The decision below is in full accord with the accepted and usual course of proceedings for extradition and is in thorough accord with applicable decisions of this Court, and is not in conflict with any decisions of other Courts of Appeals.

The petition does not present a matter requiring a review on certiorari within the considerations set forth in Rule 19 of the Rules of this Court, and the petition for certiorari should be denied.

Respectfully submitted,

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